Public Prosecutor v Nasir bin Malik

HIGH COURT (KOTA KINABALU) — CRIMINAL TRIAL NO K46-01 OF 1995
TEE AH SING JC
12 JUNE 1995

Criminal Procedure *— Sentence — Mitigating factors — Charge of cupable homicide not amounting to murder — Accused was first offender — Only 21 years old at date of offence — Remorseful — Pleaded guilty — Saved court's time and inconvenience to witnesses — Deceased instigated fight — Whether to reduce sentence — Penal Code (FMS Cap 45) s 304*

Criminal Procedure *— Sentence — Deterrent sentence — Cupable homicide not amounting to murder — Accused stabbed deceased to death — Whether court should pass deterrent sentence for public interest — Penal Code (FMS Cap 45) s 304*

The accused was charged under s 304 of the Penal Code (FMS Cap 45) for an offence of culpable homicide not amounting to murder. It was alleged that on 22 June 1994, the accused, aged 21, had caused the death of one Edmund bin Poloot ('the deceased') in a fight by stabbing the deceased with a knife. The accused pleaded guilty to the charge. The court convicted the accused upon ascertaining that he understood the nature and consequences of his plea of guilty. The court had to decide the appropriate sentence to be imposed in the circumstances of the case.

Held, sentencing the accused to 12 years' imprisonment:

(1) There were a number of mitigating factors that the court should take into account before imposing the sentence. In this case, the accused was a first offender and was only 21 years old at the date of the offence. He was remorseful for his action, and had also pleaded guilty to the charge. Further, it appeared that the deceased was the one who instigated the fight which resulted in the fatal stabbing by the accused.

(2) The court had also taken public interest into consideration in imposing the sentence. The offence committed by the accused in this case was a serious crime which required a deterrent sentence. Thus, a sentence of imprisonment should be imposed.

(3) If the accused claimed trial, and if the court found him guilty, a sentence of 16 years' imprisonment would be imposed. However, as the accused had pleaded guilty and thus had saved the court's time and the inconvenience of the witnesses, he would be given a ¼ discount in the sentence given. It follows that a 12 years' imprisonment commencing from the date of arrest would be appropriate in this case.

[Bahasa Malaysia summary

Tertuduh telah dipertuduh di bawah s 304 Kanun Keseksaan (NMB Bab 45) atas kesalahan homisid salah yang tidak merupakan bunuh. Adalah dikatakan bahawa pada 22 Jun 1994, tertuduh yang berumur 21 tahun telah menyebabkan kematian seorang yang bernama Edmund bin Poloot ('si mati') dalam suatu pergaduhan, dengan menikam si mati dengan sebilah pisau. Tertuduh mengaku bersalah atas pertuduhan tersebut. Mahkamah menyabitkan tertuduh setelah memastikan bahawa tertuduh memahami sifat dan akibat pengakuan salahnya. Mahkamah harus memutuskan hukuman yang wajar dijatuhkan dalam keadaan kes ini.

Diputuskan, menjatuhkan hukuman penjara 12 tahun ke atas tertuduh:

(1) Terdapat beberapa faktor pengurangan hukuman yang harus diambil kira oleh mahkamah selepas menjatuhkan hukuman. Dalam kes ini, tertuduh merupakan pesalah pertama kali, dan dia hanya berumur 21 tahun apabila melakukan kesalahan. Lebih-lebih lagi, dia telah berasa kesal atas perbuatannya, dan telahpun mengaku bersalah. Juga, nampaknya si matilah yang telah memulakan pergaduhan yang menyebabkan tertuduh melakukan tikaman yang membawa padah tersebut.

(2) Mahkamah juga telah mengambil kira kepentingan awam apabila menjatuhkan hukuman. Kesalahan yang dilakukan oleh tertuduh adalah jenayah yang serius yang memerlukan hukuman pencegahan. Maka, hukuman penjara harus dijatuhkan.

(3) Jika tertuduh menuntut perbicaraan, dan jika mahkamah mendapatinya bersalah, hukuman penjara selama 16 tahun akan dijatuhkan. Walau bagaimanapun, oleh kerana tertuduh telah mengaku bersalah dan dengan itu telah menjimatkan masa mahkamah dan mengelakkan kepayahan saksi, dia akan diberikan pengurangan hukuman sebanyak ¼. Maka, hukuman penjara sepanjang 12 tahun bermula dari tarikh penangkapan akan dijatuhkan dalam kes ini.]

Notes

For cases on sentencing, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2213–2674.

Cases referred to

Lee Weng Tuck & Anor v PP [1989] 2 MLJ 143 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (folld)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (folld)
R v Kenneth John Ball (1951) 35 Cr App R 164 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (folld)

Legislation referred to

Penal Code (FMS Cap 45) ss 302, 304

Duncan Sikodol (Deputy Public Prosecutor) for the public prosecutor.
Juliana Yapp (*Yapp & Ubu*) for the accused.

Cur Adv Vult

Tee Ah Sing JC: The accused was committed to stand trial in the High Court for an offence of murder under s 302 of the Penal Code (FMS Cap 45) ('the Penal Code').

However, today the prosecution has amended the charge to one under s 304 of the Penal Code as follows:

> That you on the 22nd day of June 1994 at about 8.20pm, at Km 8, Jalan Kabusak, Penampang, in the District of Penampang, in the State of Sabah, caused the death of one Edmund bin Poloot (M), Kadazan 30 years old with the intention of causing such bodily injury as was likely to cause death and thereby committed an offence of culpable homicide not amounting to murder punishable under s 304 (first limb) of the Penal Code.

The accused then pleaded guilty to the amended charge. The accused was informed that since he has pleaded guilty there will be no trial, and he was also told that the punishment for the offence is that he shall be punished with imprisonment for a term which may extend to 20 years and shall also be liable to a fine. After the explanation was given, the accused was asked again whether he still wished to plead guilty. The accused informed the court that he still wished to plead guilty, and that he also understood the nature and consequence of his plea of guilty.

The learned deputy public prosecutor then read out the statement of facts. The facts as presented by the learned deputy public prosecutor were as follows:

On 22 June 1994 at about 7.50pm, the deceased was travelling in a mini bus registration no SA1940 bound for Penampang.

Upon reaching the bus stop in front of Sacred Heart Church, the accused together with two of his friends boarded the said mini bus.

While on the journey, the deceased had an argument and a fight with the accused. As a result, the deceased upon reaching Kg Sindanaan, disembarked from the bus and went to the house of a nearby friend to seek for help. The said friend obliged, whereupon he got onto his motorbike with the deceased and gave chase to the said bus.

The deceased and his friend managed to catch and stop the bus at Kg Tunoh whereupon the accused joined by a few kampung folks asked all the passengers in the bus to disembark.

Fearing that he might be harmed, the accused then tried to run away, but was chased by the deceased. During the chase, the deceased managed to catch the accused whereupon a struggle ensued. During the struggle,

the accused took out a knife and stabbed the deceased a few times in the back and chest. The accused then fled. A

The deceased was quickly rushed to Queen Elizabeth Hospital Kota Kinabalu but unfortunately he died upon arrival. His cause of death was classified as hypovolaemia shock due to penetration into the heart secondary with stab wound. B

The accused was arrested on 27 June 1994 at Sinsuran, Kota Kinabalu.

The accused was then asked whether he understood the facts and whether he agreed to it. The accused replied that he understood the facts and agreed with the facts. The court then asked him whether he still maintained his plea of guilty, and he replied in the affirmative. C

The court had ascertained that the accused understood the nature and consequences of his plea of guilty. The court had also ascertained that the accused intends to admit without qualification the offence against him. The court thus accepted his plea of guilty and convicted him. The safeguards as stated by the Supreme Court in the case of *Lee Weng Tuck & Anor v PP* [1989] 2 MLJ 143 were followed. D

In imposing sentence, I took into consideration the following mitigating factors:

(a) the accused has pleaded guilty;

(b) the accused is a first offender; E

(c) he was 21 years old at the date of the offence;

(d) he is remorseful and promised not to commit the offence again;

(e) from the facts it discloses that the deceased gave chase to the accused and thereby instigating a further commotion and fight resulting in the fatal stabbing of the deceased; F

(f) by pleading guilty, the accused has saved the court's time and inconvenience to witnesses; and

(g) when an accused person has pleaded guilty, a discount should be given. G

In *Sau Soo Kim v PP* [1975] 2 MLJ 134, a Federal Court decision, where Lee Hun Hoe CJ (Borneo) at p 137 said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses. H

In the case of *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, Mohamed Azmi SCJ delivering the judgment of the Supreme Court at p 170 stated as follows:

> For determining the length of custodial sentence in pleading-guilty cases, the test to be adopted could be found in *R v Boyd* (1980) 2 Cr App R(S) 234 where Cumming-Bruce LJ said: I
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> 'The policy of the courts is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance

> of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty. So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence? The answer to that is that the appropriate sentence in these circumstances would not have been more than three years. That points to the fact that this sentence was rather on the heavy side, because it did not give sufficient allowance for the plea of guilty.'

However, in my view, the offence committed by the accused is a serious crime punishable under the first limb of s 304 of the Penal Code as follows:

> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to a fine if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death.

The learned deputy public prosecutor urged the court to pass a deterrent sentence as offences of this nature are rampant in Sabah.

In the case of *PP v Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop Sani J (as he then was) at p 257 said, 'One of the main consideration in the assessment of sentence is of course the question of public interest.' His Lordship quoted with approval the dictum of Hilbery J in *R v Kenneth John Ball* (1951) 35 Cr App R 164.

In this case, I have also taken into consideration public interest. Public interest requires that a sentence of imprisonment be sufficient to deter not only the accused but other persons of a like mind as the same sentence shall be imposed in cases of this kind.

The accused has taken away the life of a person which is the most precious treasure of all.

What is the amount of discount to be given is laid down by the Supreme Court in the said case of *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 at p 171, where Mohamed Azmi SCJ said:

> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between ¼ and ⅓ of what otherwise would have been the sentence.

I am of the view that if the accused had claimed trial, and if I had found him guilty, I would have no hesitation to sentence him to 16 years imprisonment. Relying on *Mohamed Abdullah Ang Swee Kang*'s case, the accused should be given a discount of ¼. I, therefore, sentence the accused to 12 years' imprisonment with effect from the date of his arrest. I am of the view that the term of imprisonment of 12 years with effect from the date of arrest will induce the accused the turn over a new leaf and act as a deterrent to others.

Order accordingly.

Reported by Azra Azman